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No. 1505

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

DISTRICT OF COLUMBIA, *Petitioner*,

v.

THE H. D. LEE COMPANY, INC., a corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. ------

DISTRICT OF COLUMBIA, *Petitioner,*

v.

THE H. D. LEE COMPANY, INC., a corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the District of Columbia, respectfully shows and represents unto your Honors that:

STATEMENT OF THE MATTER INVOLVED

This case is a companion to the case of *District of Columbia v. Johnson & Wimsatt, Inc.*, No. 9384, decided by the United States Court of Appeals for the District of Columbia on March 24, 1947, and involves the construction and application of

the District of Columbia Income Tax Act with respect to the tax on corporations.

Section 2(b) of the District of Columbia Income Tax Act as amended by Section 1 of an act approved June 22, 1942 (*infra*), taxed "the taxable income from District of Columbia sources" of every corporation not specifically exempted therefrom and provided, *inter alia,* that income derived from the procurement of orders for the sale of personal property by means of telephonic communication, written correspondence or solicitation by salesmen in the District "where such orders require acceptance without the District before becoming binding on the purchaser and seller" *and* "title to such property passes from the seller to the purchaser without the District" is not from District of Columbia sources.

The 1942 amendment of Section 2(b) was made applicable to the taxable years beginning after December 31, 1941.

Litigation in this case first arose in the Board of Tax Appeals for the District of Columbia on an appeal by the respondent from denial by the Assessor of a claim for refund of the taxes paid by the respondent for the year 1942 (R. 3, 4).

The respondent is a Kansas corporation, having its principal place of business in Kansas City, Missouri, and, during the tax year involved, was engaged, among other things, in the manufacture of work clothing. It maintained a factory and office at Trenton, New Jersey. From time to time during the tax year involved respondent sent salesmen into the District of Columbia to solicit orders for the sale of work clothing to merchants in the District (R. 4, 5, 19). The orders obtained from respondent's customers in the District were taken on blank forms furnished by the respondent to its salesmen which contained various spaces to be filled in, and for the signature of the respondent by the salesman as well as for signature by the buyer (R. 10). All sales made in the District by respondent's salesmen were accomplished by use of the aforesaid form of contract (R. 17).

The Assessor of the District assessed a tax against the respondent based on sales of merchandise made by the respondent for delivery in the District of Columbia during the calendar year 1942 (R. 4, 5). The Board of Tax Appeals, on appeal by respondent from the aforesaid assessment, determined that title to the merchandise sold by respondent for delivery in the District did not pass in the District and that the respondent was entitled to a refund of the tax involved (R. 5, 6). In thus deciding the case the Board stated in a memorandum that this case was governed by the decision of the Court in *Electric Storage Battery Company, Inc.*, v. *District of Columbia*, ____ U. S. App. D. C. ____, 155 F. 2d 867, and referred to the case of *Johnson & Wimsatt, Inc.*, v. *District of Columbia*, D.C.B.T.A., Docket 856, 74 Wash. Law Rep. 569, (which is the companion case referred to above) wherein the Board had held that the decision of the Court in the *Electric Storage Battery Company* case, *supra*, "makes the place of passage of title the sole test of taxability," under the District of Columbia Income Tax Act. Your petitioner requested that the Board of Tax Appeals find that orders taken in the District did not require acceptance without the District before becoming binding on the purchaser and seller (R. 7, 8). The Board refused to make such finding (R. 11) although there was substantial evidence to support it, and no evidence to support a finding that orders taken in the District required acceptance without the District (R. 15-20).

From the decision of the Board of Tax Appeals your petitioner, the District of Columbia, petitioned for review by the United States Court of Appeals for the District of Columbia (R. 11-15). That Court affirmed the decision of the Board of Tax Appeals.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered April 21, 1947 (R. 25).

The jurisdiction of this Court to issue the writ applied for is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938, c. 229; U. S. Code, 1940 Ed., Title 28, Sec. 347(a)).

QUESTIONS PRESENTED

1. Under the District of Columbia Income Tax Act, does the liability of corporations for tax on income resulting from the sale of, or dealings in, tangible personal property depend *solely* upon a determination of whether legal title to such property passed within or without the District?

2. Stated otherwise, does the jurisdiction where, under the general law of sales, legal title to tangible personal property passes from the seller to the buyer have the *sole* power to tax the income resulting from the sale of, or dealings in, such property to the exclusion of all other tax jurisdictions, regardless of the location of the seller in another jurisdiction, and notwithstanding commercial activities of the seller in connection with the sale in such other jurisdiction?

3. Is income derived from the procurement of orders for the sale of personal property through solicitation by salesmen in the District "income from District of Columbia sources" where such orders do not require acceptance without the District before becoming binding on the purchaser and seller?

4. Is income derived from sales of personal property, under contracts consummated in the District, income from District of Columbia sources in those cases in which it is stipulated by the parties that the goods shall be shipped f.o.b. elsewhere?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The United States Court of Appeals for the District of Columbia has decided a question of general importance in this case which has not been, but should be, settled by this Court.

(a) The District of Columbia Income Tax Act is applicable to all corporations, whether domestic or foreign, which engage in business or commercial activity in the District. Various commercial activities by such corporations incident to the production of income, including income resulting from the sale of tangible personal property, usually occur in more than one tax jurisdiction. The determination of the taxable source of such income requires consideration and analysis of the factors employed in the production of income—use of capital, employment of labor, consummation of contracts of sale, and actual passage of title to the goods sold. Which of these factors constituted a taxable event, under the District income tax law, as originally enacted, is the general question involved.

(b) In addition to the District of Columbia, there are some thirty-three States which impose taxes on, or measured by, income from sources within the taxing jurisdiction.[1] Many of such State laws provide for the allocation and apportionment of income, with no exception made as to income resulting from the sale of tangible personal property.[2] A definitive opinion by this Honorable Court indicating the taxable significance, for purposes of allocation and apportionment, of the various factors involved in the production of income, is essential not only to the proper administration of the District income tax law, but as well to corporations whose business activities extend into the District of Columbia and into those States having income tax statutes similar to the District's. Such an opinion would also appear to be essential for the proper administration of the income tax laws of such States.

(c) The District statute is closely related to the Federal income tax law (R. 24). The Federal Internal Revenue Code

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[1] See "Allocation of Income in State Taxation," *Aitman and Keesling* (CCH, 1946), c. I, p. 19; Sec. 119, Internal Revenue Code; Sec. 2(b) of the District of Columbia Income Tax Act, *infra*, p. 12.

[2] Id. footnote 1, c. VII, pp. 129-159, and Sec. 4(b), *infra*, p. 13. Both Sec. 4(b) of the Act and regulations made under the Act provided for allocation and apportionment.

provides that "In the case of a foreign corporation gross income includes only the gross income from sources within the United States."[3] The Federal Internal Revenue Code also provides a method of treatment of income resulting from the purchase of personal property within and its sale without the United States and from the purchase thereof without and its sale within the United States.[4] Because the word "sale," in its narrowest sense, has been held to mean the technical passage of title to personal property sold, and, in a broader sense, to mean the consummation of contracts of sale,[5] confusion has resulted as to whether the narrow definition is to be used in allocating the source of income, or whether both meanings of the word are to be employed for the purposes of allocation and apportionment of income resulting from the sale of such property. For this reason, it would seem that a determination of this case would be valuable in the administration of the Federal income tax law with respect to the taxes imposed thereunder on the income of foreign corporations.

2. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction or application of a statute enacted by the Congress of the United States which has not been, but should be, settled by this Court.

(a) While this Honorable Court has had for consideration the construction of the statute involved with respect to taxes imposed thereunder upon individuals,[6] this Court has not considered the construction of the statute with respect to the taxes imposed thereunder upon the income of corporations. It is of great importance that corporations as well as individuals have their liability under the District income tax law clearly defined.

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[3] Sec. 231(c), I. R. C.
[4] Sec. 119(e)(2), I. R. C.
[5] See pp. 14, 15 of the brief in support of this petition.
[6] *District of Columbia* v. *Murphy*, et al, 314 U. S. 441, 86 L. Ed. 329, 62 S. Ct. 304.

(b) It is extremely important to the District of Columbia Government that the basis for taxation of corporate income under the statute be settled.

3. The Court of Appeals has not given proper effect to applicable decisions of this Court.

4. The Court of Appeals has not followed or given proper effect to its own applicable decisions prescribing what constitutes a binding agreement between parties to a contract of the kind here involved.

WHEREFORE, Your petitioner prays the allowance of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia in this cause, and that said cause may be reviewed and determined by this Honorable Court, and that the judgment of said Court of Appeals may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

By:

DISTRICT OF COLUMBIA,
Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinions of the Board of Tax Appeals for the District of Columbia (R. 6) and the United States Court of Appeals for the District of Columbia (R. 22) are not yet reported.

JURISDICTION

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition.

STATEMENT OF THE CASE

The respondent is a Kansas corporation, having its principal place of business in Kansas City, Missouri, and, during the tax year involved, was engaged, among other things, in the manufacture of work clothing. It maintained a factory and office at Trenton, New Jersey. From time to time during the tax year involved respondent sent salesmen into the District of Columbia to solicit orders for the sale of work clothing to merchants in the District (R. 4, 5, 19). This practice had existed for 15 or 16 years (R. 20). The orders obtained from respondent's customers in the District were taken on blank forms furnished by the respondent to its salesmen, which forms contained spaces to indicate quantity, lot number, size and price of the clothing sold; the route, date, and terms of f.o.b. shipment; and for approval of credit rating. The form also contained spaces in the heading thereof for insertion of the name of the salesman, the name of the person or company

to whom the goods were sold, and to whom such goods were to be shipped, and at the bottom thereof the following (R. 10):

"H. D. LEE MERCANTILE CO. APPROVED

_____Salesman _____Buyer"

There was no condition or requirement on the aforesaid blank form (R. 10) that the contract or order was subject to acceptance outside the District of Columbia. No order obtained from a customer located in the District was rejected by respondent during the tax year involved (R. 18). It was the understanding of one of respondent's customers in the District, who had been dealing with respondent for many years, that when he placed an order for clothing with a salesman of respondent the goods would be shipped to him (R. 19, 20). The same customer testified that he had an established line of credit with respondent and he was not ever told that the goods would be shipped "if the credit department approves" (R. 20).

As stated in the petition to this Court (*supra*, p. 3), the Assessor of the District assessed a tax against the respondent based on the aforesaid sales in the District. On appeal, the Board of Tax Appeals determined that title to the property sold did not pass in the District of Columbia (R. 5, 6) and directed that the tax be refunded (R. 7).

Petitioner seasonably filed a motion requesting the Board to make findings of fact,[1] and to amend its conclusions of law and decision, so as to hold that orders taken in the District during the calendar year 1942 by the respondent did not require acceptance without the District before becoming bind-

[1] By Sec. 3, Title IX, of the District of Columbia Revenue Act of 1937, as added by the Act of May 16, 1938 (52 Stat. 371, ch. 223; Title 47, Sec. 2403, D. C. Code, 1940 ed.), as originally enacted and as amended, the Board of Tax Appeals is required to make "separate findings of fact."

ing on the purchaser and seller; that sales of such merchandise resulted in taxable income from District sources; and that the action of the Assessor in disallowing respondent's claim for refund of the tax involved was correct and should be affirmed (R. 7, 8, 9). The Board thereafter entered an order amending what was termed "Finding of fact No. II" by adding thereto a statement that the orders involved were taken on certain blank forms (R. 9, 10) and a statement that such orders were transmitted to the Trenton office for credit approval and, if approved, the orders were filled at Trenton, New Jersey, and delivered to a common carrier for transportation and delivery in the District. In other respects the Petitioner's motion was overruled (R. 11).

On petition for review by the United States Court of Appeals for the District of Columbia it was the contention of petitioner not only that the orders involved did not require acceptance without the District (as stated in the Court's opinion, R. 23) but also that (1) such orders were accepted and became binding on the purchaser and seller in the District, and that (2) the Board of Tax Appeals erred in holding that the present case is governed by a prior decision of the Court of Appeals which was decided upon the question of where title passed (R. 14, 15). The Court of Appeals affirmed the decision of the Board of Tax Appeals (R. 24).

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the passage of title to tangible personal property from the seller to the buyer within or without the District is the sole test to be applied in determining whether the income resulting from the sale of such property is subject to tax under the District of Columbia Income Tax Act.

2. In holding that the orders involved required acceptance without the District before becoming binding upon the seller.

3. In holding that petitioner had the burden of proving that respondent's salesmen had authority to enter into binding contracts of sale.

4. In holding that the income in question was not "from District of Columbia sources" within the meaning of the statute involved.

STATUTES INVOLVED

The statutory provisions involved are contained in the District of Columbia Income Tax Act of 1939, as amended, the material portions of which are as follows:

Section 2(b) as originally enacted (53 Stat. 1087, c. 367), D. C. Code, 1940 ed., Sec. 47-1502(b), provided:

> "(b) TAX ON CORPORATIONS. — There is hereby levied for each taxable year upon the taxable income from District of Columbia sources of every corporation, whether domestic or foreign (except those organizations expressly exempt under paragraph (d) of this section), a tax at the rate of 5 percentum thereof."

Said Section 2(b) was amended by the Act of June 22, 1942 (56 Stat. 376, c. 433), D. C. Code, 1940 ed., Supp. IV, Sec. 47-1502(b), by adding, *inter alia*, the following proviso:

> "*Provided, however,* That income derived from the procurement of orders for the sale of personal property by means of telephonic communication, written correspondence, or solicitation by salesmen in the District where such orders require acceptance without the District before becoming binding on the purchaser and seller and title to such property passes from the seller to the purchaser without the District is not from District of Columbia sources:"

The amendment to Section 2(b) was made applicable to taxable years beginning after December 31, 1941, by Section 4(a) of the Act of June 22, 1942, *supra*.

Sec. 4(a) (53 Stat. 1088, c. 367), as amended by Sec. 1(b) of the Act of February 2, 1942 (56 Stat. 43, c. 33), D. C. Code, 1940 ed., Supp. IV, Sec. 47-1504(a):

> "DEFINITION.—The words 'gross income,' as used in this title, include gains, profits, and * * * income derived from professions, vocations, trades, businesses, commerce, or sales or dealing in property, whether real or personal, growing out of the ownership, or use of, or interest in, such property; also from * * * transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever."

Sec. 4(b) (53 Stat. 1088, c. 367), D. C. Code, 1940 ed., Sec. 47-1504(b):

> "(b) OF CORPORATIONS.—In the case of any corporation, gross income includes only the gross income from sources within the District of Columbia. The proper apportionment and allocation of income with respect to sources of income within and without the District may be determined by processes or formulas of general apportionment under rules and regulations prescribed by the Commissioners."

Sec. 43(12) (53 Stat. 1106, c. 367), D. C. Code, 1940 ed., Sec. 47-1543(12):

> "(12) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling, or commercial activity in the District of Columbia; * * *"

RULES INVOLVED

Rule 28, Rules of Procedure before the Board of Tax Appeals for the District of Columbia, as amended January 1, 1943:

"The burden of proof shall be upon the petitioner, except as otherwise provided by statute and except, that in respect of any new matter pleaded in its answer, it shall be upon the District."

SUMMARY OF ARGUMENT

Petitioner respectfully urges that determination of the place of passage of title to personal property sold, both under the statute involved as originally enacted and as amended, is not the sole test of taxability. This contention is fully presented in the brief for petitioner filed in this Honorable Court in the companion case of District of Columbia v. Johnson & Wimsatt, infra, and is adopted in the present case.

The contracts here involved were made in the District of Columbia and, under applicable decisions of this Honorable Court and of the United States Court of Appeals for the Distric of Columbia, the Court of Appeals should have so held. The Court of Appeals clearly has not followed the applicable decisions of this Honorable Court or its own. Petition for writ of certiorari should be granted to correct the inconsistent decisions of the Court of Appeals and to establish the bases for taxability under the District of Columbia Income Tax Act as to corporations in accordance with the intent of the Congress.

ARGUMENT

I

Passage of title to personal property from seller to buyer within or without the District is not the sole test of taxability under the District of Columbia Income Tax Act.

The question whether the sole test of taxability of income growing out of sales of personal property, under the District of Columbia Income Tax Act, *supra*, is passage of title within or without the District of Columbia, was clearly presented to

the United States Court of Appeals for the District of Columbia in this case and in the companion case of *District of Columbia* v. *Johnson & Wimsatt, Inc.* (No. 9384 decided by the Court of Appeals on March 24, 1947, R. 24). In the latter case [2] the Board of Tax Appeals decided this question on authority of *Electric Storage Battery Co.* v. *District of Columbia,*[3] holding that the decision of the Court of Appeals in the *Electric Storage Battery* case "makes the place of passage of title the sole test of taxability." The Court of Appeals held such to be the rule in the *Johnson & Wimsatt* case (R. 24). The *Johnson & Wimsatt* case involves a tax year prior to the 1942 amendment of Section 2(b) of the District statute; the *Electric Storage Battery* case involved tax years before and after the 1942 amendment, and the present case involves a tax year after such amendment became law.

The contentions of counsel for petitioner on this point are fully set forth in the brief for petitioner filed in this Honorable Court in the *Johnson & Wimsatt* case (No. ----, October Term, 1946). It is believed that a repetition of such contentions herein is unnecessary. Therefore, copies of the petition, brief and record which have been filed in the *Johnson & Wimsatt* case will be forwarded to counsel for respondent with copies of the petition, brief and record in this case.

II

The orders involved did not require acceptance without the District before becoming binding on the parties

If, as the Court of Appeals has clearly held (R. 24), the sole test of taxability is determination of the place of passage of title to goods sold, both under the statute as originally enacted and as amended, then there is no substance or meaning to the first part of the proviso added to Section 2(b)

[2] 74 Wash. Law Rep. 569.
[3] 155 F. 2d 867.

of the statute by the 1942 amendment, *supra*. That amendment, *inter alia*, excludes income derived from orders obtained in the District where such orders require acceptance without the District before they are binding on the purchaser and seller. It is not to be assumed that the Congress enacted a useless statutory provision. Courts are not free to reject the literal or usual meaning of the words of a statute and thwart the obvious purpose thereof. *Helvering* v. *Hammel*, 311 U. S. 504, 511. Nor should a statute be construed to render it ineffective if another interpretation will make it effective. *United States* v. *Powers*, 307 U. S. 214, 217; Cf. *Helvering* v. *Flaccus Leather Co.*, 313 U. S. 247, 249.

It is important to note that the 1942 amendment of Section 2(b) grants relief from the tax on "income derived from the procurement of orders for the sale of personal property" where such orders *require acceptance without the District* before becoming binding on the purchaser and seller, *and* title to such property passes without the District. It is respectfully submitted that the so-called "credit approval" referred to in the evidence (R. 17, 20), by the Board (R. 11), and by the Court of Appeals (R. 23) is not and does not purport to be the final act binding the parties to the agreement. It is not a material part of the agreement (R. 10, 20). There is nothing in the contract or order form here involved which *requires acceptance* of the orders outside the District, as to credit approval or otherwise. In fact, the testimony of Mr. Gritz (R. 20) refutes the theory. The decision of the Court of Appeals in this case is not in harmony with the prevalent understanding set forth in *National Bank of Commerce of Boston* v. *Merchants' National Bank of Memphis*, 91 U. S. 92, 95, cited in our brief to the Court of Appeals, wherein this Court pointed out that "a sale on credit entitles the purchaser to immediate possession of the property sold, unless there be a special agreement that it may be retained by the vendor."

It is also respectfully submitted that the decision in the present case is contrary to applicable decisions of the Court

of Appeals. It was pointed out in *District of Columbia* v. *Buckley*, 75 U. S. App. D. C. 301, 304, 128 F. 2d 17, 20, cert. den. 317 U. S. 658, that the decisions of the Court of Appeals should be relied upon in local matters, rather than decisions of a State appellate court. The Court of Appeals also stated in *Warring* v. *Colpoys*, 74 App. D. C. 303, 305, 122 F. 2d 642, 645, cert. den. 314 U. S. 678, that "When a case is decided it is expected that people will make their behavior conform to the rule it lays down * * *." As pointed out above, petitioner does not believe that passage of title to property sold is the sole test of taxability under the statute involved. The principal question involved in the present case before the Board of Tax Appeals and the Court of Appeals, therefore, was whether the orders solicited by respondent's salesmen in the District *required* "acceptance without the District before becoming binding on the purchaser and seller." Counsel for petitioner relied on two decisions of the Court of Appeals which, it was believed, determined the question. These cases are *Curtis* v. *American Case and Register Co.*, 38 App. D. C. 115, and *Stern* v. *Moneyweight Scale Co.*, 42 App. D. C. 162. In the *Curtis* case the order specifically provided for acceptance thereof by the seller and the Court of Appeals held that until the order was accepted by the seller, by notifying the buyer of such acceptance, there was no contract. In the *Stern* case the order for merchandise did not provide for acceptance by the seller and the agent of the seller had authority to consummate the agreement. The Court of Appeals distinguished the *Curtis* case in the *Stern* case and held that, since the agent was authorized to consummate the contract, the buyer "could not withdraw from his contract unless it was induced by the misrepresentation of plaintiff's agent."

We respectfully submit that if there was no binding agreement made in the District in the present case because, as the Court of Appeals indicated, the buyer's order, in each instance, "constituted his offer to the salesman's principal" (R. 23), and required acceptance by the respondent, there was

no better authority than the local *Curtis* case, *supra*. However, the orders here involved were *not "taken subject to acceptance"* as they were in the *Curtis* case, and the respondent did not in any instance (R. *passim*) notify District buyers of acceptance of their orders.

In the present case, as in the *Stern* case, *supra*, the orders did not provide that they were taken subject to acceptance. On the contrary, the orders here involved provided for approval by the salesman on behalf of the respondent, and for approval by the buyer (R. 10). Respondent's evidence (R. 17) plainly shows that: *"All sales made by traveling salesmen, including those in the District of Columbia*, are on this standard form of contract or order blank." (Emphasis supplied.) There were no conditions, exceptions, special requirements or reservations anywhere printed on the aforesaid form. No order taken in the District was rejected by respondent during the tax year involved (R. 18). The record is silent (R. *passim*) as to whether respondent ever notified any of its customers after receipt of the "contract or order" that it was or was not "accepted." The only merchant in the District who testified at the hearing before the Board of Tax Appeals had dealt with the respondent about 15 or 16 years. He had an established line of credit with respondent and was not ever told that the merchandise would be shipped to him if the credit department approved (R. 19, 20). The testimony of the witness is consistent with the answer given by respondent's Treasurer (R. 17) as to sales made by respondent's salesmen, but is inconsistent (R. 20) with the finding of the Board of Tax Appeals (R. 11), referred to by the Court (R. 23), to the effect that orders were transmitted to the Trenton office for credit approval and, if approved, were filled.

Petitioner respectfully submits that respondent's salesmen clearly had authority to make the contracts involved, and there was a binding agreement between the parties under the *Stern* case, *supra*, when the contract form was filled in and

executed by respondent's salesman and the buyer. In this respect the Court of Appeals has stated (R. 23) that the petitioner "has failed to show that the salesmen had authority, expressed or implied, to enter into binding contracts of sale." It is respectfully submitted that, in this regard, the burden of proof was upon the respondent,[4] who was the petitioner before the Board of Tax Appeals.

Although the Board of Tax Appeals made a "Statement of the Case" rather than findings of fact (R. 4), as required by law,[5] the Board thereafter entered an order amending what it termed "Finding of Fact No. II" (R. 9) which was item II of the statement of the case. Under such circumstances, counsel for petitioner treats the Board's statement of the case, as amended, insofar as it goes, as findings of fact for the purpose of this brief. However, it is respectfully pointed out that the Board, in overruling material portions of petitioner's motion to make findings of fact, etc. (R. 7-11), refused to make a finding that the orders here involved did not require acceptance without the District before becoming binding on the parties (R. 8). There was substantial evidence to support such finding (R. 15-20). It is obvious from the Board's decision in the *Johnson & Wimsatt* case, *supra*, that the Board was of opinion that the *sole test* of taxability under the statute involved is the place of passage of title to property sold, and, therefore, whether orders did or did not require acceptance without the District before becoming binding on the parties was immaterial. There can be no question on this point since the Board of Tax Appeals had previously held in *Electric Storage Battery Co.* v. *District of Columbia*, 73 Wash. Law Rep. 253, 255, that *both* acceptance of orders *and* passage of title without the District were prerequisites to relief from the tax under the 1942 amendment of Section 2(b).

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[4] Rule 28, Rules of Procedure Before the Board of Tax Appeals, *supra*, p. 13. *District of Columbia* v. *Morris*, 75 Wash. Law Rep. 333, __ U. S. App. D. C. __; *Waterman* v. *District of Columbia*, 74 Wash. Law Rep. 337; Cf. *Helvering* v. *Taylor*, 293 U. S. 507, 515.

[5] Footnote 1, *supra*, p. 10.

supra. It was not until the Court of Appeals reversed the Board's decision in the *Electric Storage Battery case, supra*, that the Board adopted the view announced in the *Johnson & Wimsatt case, supra*, which has been adopted by the Court of Appeals. Were it not for this change it is quite likely that the Board of Tax Appeals would have determined that the orders involved did not require acceptance without the District before becoming binding on the parties and decided this case the other way. Certainly the respondent, through its salesmen who solicited business in the District for many years (R. 19, 20), was engaging in "business" and "commercial activity" and "sales or dealings in property" in the District within the meaning of those terms:

> *Hazen* v. *National Rifle Association*, 69 App. D. C. 339, 101, F. 2d 432;
>
> *Chaloner* v. *Helvering*, 63 App. D. C. 85, 69 F. 2d 571;
>
> *Doggett* v. *Burnet*, 62 App. D. C. 103, 65 F. 2d 191;
>
> *Colgate Palmolive Peet Co.* v. *District of Columbia*, 71 App. D. C. 324, 110 F. 2d 264;
>
> *Cedar Hill Cemetery Corp.* v. *District of Columbia*, 75 App. D. C. 84, 124 F. 2d 286;
>
> *Panitz* v. *District of Columbia*, 74 App. D. C. 284, 122 F. 2d 61.

See also:

> *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320;
>
> *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 354;
>
> *Frene* v. *Louisville Cement Co.*, 77 U. S. App. D. C., 129, 134, 134 F. 2d 511, 516, 146 A. L. R. 926, 933.

CONCLUSION

It is believed that the Court of Appeals has herein decided a question of substance relating to the application of an Act of Congress, which is one of material consequence to the revenues of the District of Columbia and to the taxpayers thereof, and that in so doing, the Court has not given proper effect to the wording of the statute, its applicable decisions, and the opinions of this Court.

Wherefore, it is respectfully urged that the writ of certiorari be granted.

Respectfully submitted,

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